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STATE OF MISSISSIPPI
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1972 SESSION OF THE LEGISLATURE

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March 2013 Supplement

to the

2012 Edition

Prepared by the Editorial Staff of the Publisher

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PREFACE

Use of Rules Supplement; format.

The March 2013 Supplement to the 2012 Edition of the Mississippi Court Rules Annotated is a publication of LexisNexis. It has been edited, annotated and indexed by the staff of the publishers. The Supplement reflects all changes and additions to the Rules, the official Comments and Notes, and the Forms received since the publication of the 2012 Rules Edition; the annotations are reviewed and updated, providing the user with the most current and useful information.

Each set of rules included in this Supplement will be followed by an index if the Supplement contains new rules for the set or if there are amendments to existing rules that necessitate changes in the index appearing in the 2012 Edition.

The material contained in this Supplement will be incorporated into the 2013 Edition of the Mississippi Court Rules Annotated.

Scope of rules and annotations.

This Supplement includes all changes and additions to the Rules, the official Comments and Notes, and the Forms that have taken place since publication of the 2012 Edition up to and including amendments effective February 1, 2013. In addition, notes construing the Rules have been taken from the reports of decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

The annotations also include Editor's notes inserted by the publisher's editorial staff to explain references or to call attention to obvious errors, inconsistencies or ambiguities in the Rules, the official Comments and Notes, and the Forms and to provide advance information on proposed new rules. Also, brackets have been editorially inserted around material in the text, when

necessary, to correct misspellings, punctuation or language and incorrect references to the Rules, sections of the Code, titles of positions, or names of institutions.

Amendments, additions, changes, and revisions of rules.

Amendments, additions, changes, and revisions since the 2012 Edition of the Mississippi Court Rules and included in this Supplement are to the following:

Rules of Civil Procedure

Rule 34
Rule 45

Information, suggestions, comments, and questions.

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March 2013 LexisNexis

MISSISSIPPI RULES OF CIVIL PROCEDURE

Adopted Effective January 1, 1982

CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 4. Summons.

JUDICIAL DECISIONS

Dismissal.
Good cause.
Service of process.
Statute of limitations.

Dismissal.

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P. 8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

Good cause.

Circuit court did not abuse its discretion when finding that a passenger failed to prove good cause for her failure to serve an employee within the 120 days of filing her complaint because the passenger chose to do very little in attempting to effect service of process on the employee; the passenger made two phone calls to the process server, which did not rise to the level of due diligence or good cause. Sykes v. Home Health Care Affiliates, Inc., — So. 3d —, 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012).

Service of process.

Information in the record appeared to be insufficient to show process in a replevin action was properly made where there was not a complete, signed return showing proof of service as required by Miss. R. Civ. P. 4(f), and the return did not make clear who was served with process or whether the requirements of Rule 4(d) were met; regardless of these deficiencies, defendant appeared at the proper court-

house on the correct date. Magee v. Covington County Bank, — So. 3d —, 2012 Miss. App. LEXIS 591 (Miss. Ct. App. Sept. 25, 2012).

When a lender failed to comply with Miss. R. Civ. P. 4(c)(4)(A) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336 (Miss. Ct. App. 2011).

Nephew was properly noticed in the estate proceeding because the chancery court's docket showed that a summons was issued to both the nephew and his mother, giving them notice of the probate of a decedent's estate, and that the summonses were returned. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

Statute of limitations.

Circuit court did not err in granting an employer summary judgment in a passenger's action to recover for injuries she sustained when a vehicle driven by an employee collided with the vehicle in which she was riding because the employee was not timely served within 120 days under Miss. R. Civ. P. 4(h), and the statute of limitations as to him expired; since the claims against the employer were wholly derivative of the employee's actions, the claims against the employer were barred. Sykes v. Home Health Care Affiliates, Inc., — So. 3d —, 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012).

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired, and the complaint was subject to dismissal with prejudice. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162 (Miss. 2011).

CHAPTER III. PLEADINGS AND MOTIONS

Rule 8. General rules of pleading.

JUDICIAL DECISIONS

Affirmative defenses.
Notice pleading.

Affirmative defenses.

Mortgagors' affirmative defense of election of remedies was waived under Miss. R. Civ. P. 8(c) because the first reference to the doctrine of election of remedies was within a supplemental memorandum in support of the mortgagors' motion for reconsideration and to vacate a judgment in favor of the mortgagee. Knight Props. v. State Bank & Trust Co., 77 So. 3d 491 (Miss. Ct. App. 2011).

Notice pleading.

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P. 8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

Rule 9. Pleading special matters.

JUDICIAL DECISIONS

Fictitious parties.
Fraud.

Fictitious parties.

Circuit court did not err in granting summary judgment in favor of the manufacturers because they were not properly substituted pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)'s relation-back provision did not apply, which meant that a wife's wrongful death claims against the manufacturers were untimely. Miller v. Engelhard Corp., 95 So. 3d 740 (Miss. Ct. App. 2012).

Circuit court did not err in granting summary judgment in favor of the manufacturers because they were not properly substituted pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)'s relation-back provision did not apply, which meant that a wife's wrongful death claims against the manufacturers were untimely. Miller v. Engelhard Corp., 95 So. 3d 740 (Miss. Ct. App. 2012).

Fraud.

Chancellor did not err in dismissing a nephew's lawsuit against his uncles for failure to state a claim upon which relief can be granted under Miss. R. Civ. P. 12(b)(6) because the nephew failed to plead his claim of fraudulent conveyance with particularity; the nephew pleaded a fraudulent conveyance in general terms but failed to state with particularity what made the conveyance fraudulent. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on the pleadings.

JUDICIAL DECISIONS

Personal jurisdiction.

Complaint alleging a piercing of the corporate veil will survive a Miss. R. Civ. P. 12(b)(2) motion to dismiss only when the complaint sets forth factual allegations indicating: (1) some frustration of expectations regarding the party to whom he looked for performance; (2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and (3) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. Canadian Nat'l Ry. Co. v. Waltman, 94 So. 3d 1111 (Miss. 2012).

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Rule 15. Amended and supplemental pleadings.

JUDICIAL DECISIONS

Amendment of pleadings.
Conforming to evidence.
Relation back.
Timeliness.

Amendment of pleadings.

Grant of summary judgment in favor of the appellee neighbors in their boundary-dispute action was proper because the

appellant neighbor had waived the defense of adverse possession, Miss. R. Civ. P. 15(a). Appellant offered no reason for the six-month delay between the filing of her answer and her motion to amend the answer to raise the affirmative defense of adverse possession; further, the affirmative defense of adverse possession would have existed prior to the filing of the lawsuit, so it was not a fact that would have been found only through discovery. Charlot v. Henry, 45 So. 3d 1237 (Miss. Ct. App. 2010).

Conforming to evidence.

In a landowner's property dispute with adjoining property owners regarding a fence, a chancery court did not abuse its discretion in not permitting a landowner to amend his complaint to conform to the evidence, pursuant to Miss. R. Civ. P. 15(b), because the proposed amendment would have prejudiced the adjoining property owners; the proposed amendment would have allowed the landowner to completely abandon his initial argument of deed confirmation and adopt the alternative argument of deed reformation. Mahaffey v. Maner, 47 So. 3d 1190 (Miss. Ct. App. Nov. 9, 2010).

Relation back.

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service of the CO. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

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Timeliness.

Car owner's request to amend her complaint was untimely and failed to conform to Miss. R. Civ. P. 15, in that the request to amend was made outside of the discovery window and the owner obtained neither leave of court nor the repair facility's written consent to amend. Beene v. Ferguson Auto., Inc., 37 So. 3d 695 (Miss. Ct. App. 2010).

CHAPTER IV. PARTIES

Rule 17. Parties plaintiff and defendant; capacity.

JUDICIAL DECISIONS

Real party in interest.

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P.

8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274 (Miss. Ct. App. Oct. 16, 2012).

CHAPTER V. DEPOSITIONS AND DISCOVERY

Rule 26. General provisions governing discovery.

JUDICIAL DECISIONS

Expert testimony.
Supplementation of responses.

Expert testimony.

Trial court erred in allowing a physician to testify about plaintiff's future medical treatment and expenses because defense counsel was not provided with the substance of the physican's facts and opinions on that subject prior to trial. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986 (Miss. 2012).

Supplementation of responses.

While a surgeon was properly qualified as an expert in surgery under Miss. R. Evid. 702, a doctor was entitled to a new trial in a medical malpractice matter as a decedent's wife failed to supplement her discovery responses regarding the substance of the expert's testimony as required by Miss. R. Civ. P. 26 (f)(1)(B) and 26(f)(2)(A) to disclose the substance of the expert's evolving-second-ulcer theory and to provide meaningful information about the decedent's hemoglobin and hematocrit levels as to enable the doctor's counsel to meet the expert's testimony at trial; the doctor's unexercised right to depose the expert did not excuse the wife's unfulfilled duty to supplement and amend her expert's opinion. Cleveland v. Hamil, — So. 3d —, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012).

RESEARCH REFERENCES

ALR. Discovery of Deleted Email and Other Deleted Electronic Records. 27 A.L.R.6th 565.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

[Effective until July 1, 2013]

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within

the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Effective from and after July 1, 2013]

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the responding party must state the form or forms it intends to use. Pursuant to Rule 26(b)(5), a responding party may also object to production of electronically stored information that is not reasonably accessible because of undue burden or cost. The party submitting the request may move for 3 an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A party need not produce the same electronically stored information in more than one form.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. (Amended effective July 1, 2013, to address production of electronically stored information.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2013, MRCP 34 was amended to specifically authorize a party to request any other party to produce electronically stored information. The amendment established the procedure for requesting production of electronically stored information and the procedure for objecting to such a request.

COMMENT

[Effective until July 1, 2013] M.R.C.P. 34(a) and (c) are identical to Miss. Code Ann. §§ 13-1-234 (a) and (c) (1972). Subdivision (b) of the rule differs from subdivision (b) of the statute in that the words "and complaint" are added after the word "summons" in the first sentences of the first and second paragraphs, and a new third paragraph is added to the rule. The former addition conforms to M.R.C.P. 4(a)(2) (copy of complaint to be served with summons); the latter tracks the recommendation of the Special Committee for the Study of Discovery, Abuse, Section of Litigation, A.B.A., Report, at 21-23 (1977).

The new paragraph, prescribing the manner of document production, is intended to deter deliberate attempts by a producing party to burden discovery with volume or disarray or deliberately mixing critical documents with others in an effort to obscure significance.

Generally, the most convenient and least burdensome method of producing documents would entail production in the order in which the documents are actually kept in the usual course of business, so that there is an internal logic reflecting business use. If this method is not elected, then the producing party may organize his paper production in accordance with the categories specified in the request. *See* also Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 764-83 (1975).

[Effective from and after July 1, 2013] MRCP 34(b) is intended to deter deliberate attempts by a producing party to burden discovery with volume or disarray or deliberately mixing critical documents with others in an effort to obscure significance.

Generally, the most convenient and least burdensome method of producing documents would entail production in the order in which the documents are actually kept in the usual course of business, so that there is an internal logic reflecting business use. If this method is not elected, then the producing party may organize his paper production in accordance with the categories specified in the request.

See also Pyle, Ott, Rumfelt, Mississippi Rules of Discovery, 46 Miss.L.J. 681, 764-83 (1975).

[Comment amended effective July 1, 2013.]

Rule 36. Requests for admission.

JUDICIAL DECISIONS

Deemed admission.

Trial court erred when it did not deem admitted a landowner's requests for admissions from a contractor because the contractor failed to timely respond under Miss. R. Civ. P. 36 and never moved to have the admissions withdrawn or amended; as a result, the trial court erred in granting summary judgment to the contractor on the landowner's breach of contract claim because the admissions were sufficient to establish the claim. Montgomery v. Stribling, — So. 3d —, 2012 Miss. App. LEXIS 607 (Miss. Ct. App. Oct. 2, 2012).

CHAPTER VI. TRIALS

Rule 43. Taking of testimony.

JUDICIAL DECISIONS

Summary judgment.

In a dispute between insurance companies, it was proper under Miss. R. Civ. P. 43(e) to permit oral testimony on liability at the summary judgment stage. Indem. Ins. Co. of N. Am. v. Guidant Mut. Ins. Co., 99 So. 3d 142 (Miss. Oct. 4, 2012).

Rule 45. Subpoena.

[Effective until July 1, 2013]

(a) *Form; issuance.*

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel.

A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(b) *Place of examination.* A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at

such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) *Service.*

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) *Protection of persons subject to subpoenas.*

(1) In General.

(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for

compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) *Duties in responding to subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(f) *Sanctions.* On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

[Effective from and after July 1, 2013]

(a) *Form; issuance.*

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command

to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel.

A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(b) *Place of examination.* A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) *Service.*

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) *Protection of persons subject to subpoenas.*

(1) In General.

(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) *Duties in responding to subpoena.*

(1) Producing Documents or Electronically Stored Information.

(A). *Documents.* A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B). *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored infor-

mation, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C). *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D). *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, motion for a protective order, or motion to quash, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(5). The court may specify conditions for the discovery, including those listed in Rule 26(b)(5).

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) *Sanctions.* On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. (Amended effective March 13, 1991; July 1, 1997; July 1, 1998; amended effective July 1, 2009 to provide a procedure for foreign subpoenas; amended effective July 1, 2013 to authorize a subpoena for electronically stored information.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 13, 1991, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a non-party witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to provide that when a deposition is to be taken on foreign litigation the subpoena shall be issued by the clerk for the county in which the deposition is to be taken. 574-576 So. 2d XXIV-XXV (West Miss. Cas. 1991).

Effective July 1, 1997 a new Rule 45 was adopted.

Effective July 1, 2013, Rule 45 was amended to specifically authorize a subpoena to command the person to whom it is directed to produce and permit inspection and copying of electronically stored information. The same amendment also established a procedure to be used when privileged or trial-preparation material is inadvertently disclosed.

COMMENT

[Effective until July 1, 2013] — A "subpoena" is a mandate lawfully issued under the seal of the court by the clerk thereof. Its function is to compel the attendance of witnesses, the production of documents and the inspection of premises so that the court may have all available information for the determination of controversies. 9 Wright & Miller, Federal Practice and Procedure, Civil § 2451 (1971).

Subpoenas are of two types: a subpoena ad testificandum compels the attendance of a witness; a subpoena duces tecum compels the production of documents and things. Both kinds of subpoenas may be issued either for the taking of a deposition or for a trial or hearing; Rule 45 governs the availability and use of both kinds of subpoenas. The rule has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute. *See*, e. g., Miss. Code Ann. § 5-1-21 (witnesses before legislative bodies); § 7-1-49 (examiner of public accounts); § 19-3-51 (county boards of supervisors); § 27-3-35 (tax commission); § 31-3-13(c) (state board of public contracts); § 43-9-13 (old age assistance investigations); § 43-11-11 (investigations of institutions for the aged or infirm); § 43-13-121 (medicaid commission); § 43-33-11 (housing authority); § 49-1-43 (wildlife, fisheries and parks board); § 49-17-21 (air and water pollution board); § 51-3-51 (water commission); § 53-1-35 (oil and gas board); § 59-21-127 (boat and water safety commission); § 61-1-35 (aeronautics commission); § 63-1-53 (hearings to suspend driver's license); § 63-17-97 (motor vehicle commission); § 63-19-29 (motor vehicle sales finance law administrator); § 67-1-37 (alcoholic beverage commission); § 73-7-27 (cosmetology license revocation or suspension); § 73-13-15 (engineer and land surveyor registration board); § 73-21-99 (disciplinary proceedings against pharmacists); § 73-25-27 (disciplinary proceedings against physicians); § 73-29-37 (disciplinary proceedings against polygraph examiners); § 73-35-23 (disciplinary proceedings against real estate brokers); § 75-35-315 (meat inspections); § 75-49-13 (proceedings involving mobile homes); § 75-67-223 (hearings on denials of small loan licenses); § 75-71-709 (securities regulations hearings); § 77-5-17(4) (board of directors of rural electrification authority); § 81-1-85 (bank examinations); § 81-13-1 (hearings on denial of application for license of credit union); § 81-13-17 (examinations of credit union license applications by department of bank supervision); and § 83-5-39(4) (1972) (hearing on charges of unfair business practices by insurance companies).

Rule 45(a)(1) provides that a subpoena shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection of evidence, or to permit inspection of premises, and provides further that a command to

produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena for the attendance of a witness at the taking of a deposition is issued as of course by the clerk upon proof of service of notice to depose as provided in MRCP 30(b) and 31(a). A notice to depose is not a condition precedent to the issuance of a subpoena for production or inspection.

Under Rule 45(a)(2), all subpoenas (except those pertaining to foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state.

See the exclusion in Rule 46(b)(11)(i) of the Rules of Appellate Procedure Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) authorizes that subpoenas may be served by a sheriff, his deputy, or any person not a party over the age of eighteen years; this provision permits attorneys to serve subpoenas. The proof of service required by paragraph (c)(2) must show, inter alia, the county in which the subpoena was served, in order to ascertain where a nonresident may be required to appear for examination in accordance with Rule 45(b).

Rule 45(c) requires advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. §§ 25-7-47 through 25-7-59 (1972).

Rule 45(d)(1) sets out the grounds for objecting to any type of subpoena.

Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsection (d)(2)(A) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence can be compelled to produce such evidence without being sworn as a witness and deposed. Further, a subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. The subpoena must specify with reasonable particularity the subjects to which the desired writings relate. The force of a subpoena for production of documentary evidence generally reaches all documents under the *control* of the person ordered to produce, saving questions of privilege or unreasonableness.

Paragraph (d)(2)(A) requires that the party serving a subpoena for production or inspection must serve a copy of the subpoena upon all parties to the action immediately after it is served on the person to whom it is directed. Thus, the rule does not contemplate that the party serving a subpoena may delay serving a copy of the subpoena on the other parties to the action until 10 days before the date designated for the production or inspection. A failure to immediately serve a copy of the subpoena on the other parties may be grounds for extending the time for compliance with the subpoena. Service must be made in accordance with Rule 5.

A subpoena for production or inspection is also subject to the provisions of Rule 26(d).

Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition the denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c).

Rule 45(e), which specifies the duties of persons served with a subpoena, does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred

to, but only to produce designated documents. If the subpoena calls for relevant information which must be compiled or selected from records which are largely irrelevant or privileged, the party compelling production should be required to bear the expense of extracting the relevant material. *See* 5A *Moore's Federal Practice,* ¶ 45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.,* 2 F.R.D. 357 (W.D.Ky.1942).

The court is authorized by Rule 45(f) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost by a witness in objecting to the subpoena.

Disobedience of a subpoena without adequate excuse may be punished as a contempt of the court. MRCP 45(g). An order for contempt may require the person subject to the subpoena to pay the attorney's fees and costs incurred by the party seeking to enforce the subpoena. The rule leaves undefined what is an adequate excuse for failure to obey a subpoena. Adequate excuse would exist when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by paragraph (b).

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at trial or hearing or at deposition, or may be issued separately. A subpoena for the attendance of a witness at the taking of a deposition is issued as of course by the clerk upon proof of service of notice to depose as provided in MRCP 30(b) and 31(a). A notice to depose is not a condition precedent to the issuance of a subpoena for production or inspection.

Under Rule 45(a)(2), all subpoenas (except those pertaining to foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state.

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Rule 45(c) requires advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. §§ 25-7-47 through 25-7-59 (1972).

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Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsection (d)(2)(A) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence can be compelled to produce such evidence without being sworn as a witness and deposed. Further, a subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. The subpoena must specify with reasonable particularity the subjects to which the desired writings relate. The force of a subpoena for production of documentary evidence generally reaches all documents under the *control* of the person ordered to produce, saving questions of privilege or unreasonableness.

Paragraph (d)(2)(A) requires that the party serving a subpoena for production or inspection must serve a copy of the subpoena upon all parties to the action immediately after it is served on the person to whom it is directed. Thus, the rule does not contemplate that the party serving a subpoena may delay serving a copy of the subpoena on the other parties to the action until 10 days before the date designated for the production or inspection. A failure to immediately serve a copy of the subpoena on the other parties may be grounds for extending the time for compliance with the subpoena. Service must be made in accordance with Rule 5.

A subpoena for production or inspection is also subject to the provisions of Rule 26(d).

Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition the denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c).

Rule 45(e), which specifies the duties of persons served with a subpoena, does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred

to, but only to produce designated documents. If the subpoena calls for relevant information which must be compiled or selected from records which are largely irrelevant or privileged, the party compelling production should be required to bear the expense of extracting the relevant material. *See* 5A *Moore's Federal Practice,* ¶ 45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.,* 2 F.R.D. 357 (W.D.Ky.1942).

The court is authorized by Rule 45(f) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost by a witness in objecting to the subpoena.

Disobedience of a subpoena without adequate excuse may be punished as a contempt of the court. MRCP 45(g). An order for contempt may require the person subject to the subpoena to pay the attorney's fees and costs incurred by the party seeking to enforce the subpoena. The rule leaves undefined what is an adequate excuse for failure to obey a subpoena. Adequate excuse would exist when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by paragraph (b).

[Comment amended effective March 13, 1991; April 18, 1995; July 1, 1997; July 1, 1998; July 1, 2009; July 1, 2013.]

JUDICIAL DECISIONS

Illustrative cases.

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Rule 52. Findings by the court.

JUDICIAL DECISIONS

Applicability.
Findings.
Waiver on appeal.

Applicability.

Chancellor erred in awarding a father custody of his children as the chancellor did not refer to the factors in the best interests of the children or identify what Albright factors were considered, which was important as several of the factors that might have been in the father's favor were altered within a month of the court's ruling when the father and the children moved to California; specific findings were mandated due to the nature of the case, and Miss. Unif. Ch. Ct. R. 4.01 and Miss. R. Civ. P. 52(a) did not apply. Parra v. Parra, 65 So. 3d 872 (Miss. Ct. App. 2011).

Findings.

Chancery court did not abuse its discretion by failing making findings of fact because a member did not request additional findings of fact under Miss. R. Civ. P. 52(a); although the chancery court had no requirement to make factual findings, its findings of fact were more than adequate to dispose of the member's counterclaims Martindale v. Hortman Harlow Bassi Robinson & McDaniel PLLC, — So. 3d —, 2012 Miss. App. LEXIS 603 (Miss. Ct. App. Oct. 2, 2012).

Since a mother failed to raise to the chancellor her challenge to the reasonableness of the child-support guidelines, she was barred from challenging the chancellor's failure to make specific findings of fact on the reasonableness of the guide-

lines. Robinson v. Brown, 58 So. 3d 38 (Miss. Ct. App. 2011).

Waiver on appeal.

Since a mother failed to assert an alleged error post-trial to the chancellor, as permitted by Miss. R. Civ. P. 52, she waived the right to complain as to this issue on appeal. Robinson v. Brown, — So. 3d —, 2011 Miss. App. LEXIS 31 (Miss. Ct. App. Jan. 25, 2011), opinion withdrawn by, substituted opinion at, modified by 58 So. 3d 38, 2011 Miss. App. LEXIS 160 (Miss. Ct. App. 2011).

CHAPTER VII. JUDGMENT

Rule 54. Judgments; costs.

JUDICIAL DECISIONS

Appeal.
Relief.
Illustrative cases.

Appeal.

Because a summary judgment was not certified as final under Miss. R. Civ. P. 54(b), and because a tenant neither sought nor was afforded permission under Miss. R. App. P. 5 to proceed with an interlocutory appeal, the appellate court lacked jurisdiction to hear the tenant's appeal. Anderson v. Britton & Koontz Bank, N.A., 55 So. 3d 1130 (Miss. Ct. App. 2011).

Relief.

Trial court's declaratory judgment establishing plaintiffs' ownership of shallow gas rights did not exceed the scope of the complaint's demand for relief, because plaintiffs could not recover damages on their conversion claim against defendants without first establishing lawful ownership of those rights. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., — So. 3d —, 2012 Miss. LEXIS 488 (Miss. Oct. 4, 2012).

Illustrative cases.

Although the parties requested child support in their respective complaint and counter-complaint for divorce, the chancellor expressly declined to rule on the issue of child support and did not certify the judgment as final pursuant to Miss. R. Civ. P. 54(b); accordingly, the appellate court lacked jurisdiction to review the issues on appeal. S.E.B. v. R.E.B., 67 So. 3d 14 (Miss. Ct. App. 2011).

Although Miss. R. Civ. P. 68 applied because the jury's award was less than the defendant's rejected offer of settlement, costs were limited to those allowable under Miss. R. Civ. P. 54(d) and, therefore, the plaintiff could not be taxed with costs for copying, trial materials, and court reporter fees, or for expert witnesses costs in excess of Miss. Code Ann. § 25-7-47. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547 (Miss. Ct. App. 2011).

Rule 55. Default.

JUDICIAL DECISIONS

Notice.
Procedure.
Review.

Notice.

Denial of the operator, manager, and son's motion to set aside a default judgment was improper because the letter from their counsel to the waitress's counsel expressed an intent to defend against the claims asserted by the waitress and they were therefore entitled to three days' notice of the hearing on the default judgment under Miss. R. Civ. P. 55(b). Kumar v. Loper, 80 So. 3d 833 (Miss. Ct. App. 2011), vacated by, remanded by 80 So. 3d 808, 2012 Miss. LEXIS 94, 162 Lab. Cas. (CCH) P61233 (Miss. 2012).

Procedure.

Obtaining a default judgment under Miss. R. Civ. P. 55 is a two-step process.

First, entry of default must be entered by the clerk of the court, which is obtained through a motion and supporting affidavits; then, the plaintiff must obtain a default judgment from the court. Brown v. Tate, 95 So. 3d 745 (Miss. Ct. App. 2012).

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Review.

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337 (Miss. Ct. App. 2011), reversed by, remanded by 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

Rule 57. Declaratory judgments.

JUDICIAL DECISIONS

Illustrative cases.

Trial court's declaratory judgment establishing plaintiffs' ownership of shallow gas rights did not exceed the scope of the complaint's demand for relief, because plaintiffs could not recover damages on their conversion claim against defendants without first establishing lawful ownership of those rights. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., — So. 3d —, 2012 Miss. LEXIS 488 (Miss. Oct. 4, 2012).

Rule 59. New trials; amendment of judgments.

JUDICIAL DECISIONS

Applicability.
Limitations.
Review.
Illustrative cases.

Applicability.

As an insured who prevailed in a negligence suit against his insurer had no postjudgment right to attorney's fees because the jury did not award punitive damages, and neither a statutory nor contractual provision authorized such fees, attorney's fees were not judgment-derivative and his postjudgment request for such fees fell within the scope of Miss. R. Civ. P. 59(e); as he failed to meet the requirements of Rule 59(e), his motion was properly denied. Fulton v. Miss. Farm Bureau Cas. Ins. Co., — So. 3d —, 2012 Miss. LEXIS 505 (Miss. Oct. 11, 2012).

Limitations.

Where the trial court, pursuant to Miss. R. Civ. P. 59, entered an order altering the divorce judgment by changing the division of the property, as this order impermissibly broadened and amended the previous judgment after the filing of the former husband's notice of appeal, the order was null and void. Strickland v. Strickland, 102 So. 3d 1216 (Miss. Ct. App. 2012).

Review.

In a personal injury action by guests against a casino, an appeal of the denial of the guests' motion to reconsider was time-barred where, following the denial of their reconsideration motion, the guests filed a recusal motion instead of filing a notice of appeal. The time for appeal commenced under Miss. R. App. P. 4(d) when the reconsideration motion was denied and the guests' failure to perfect a notice of appeal within 30 days subjected the appeal to dismissal. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Illustrative cases.

Grant custody to the father was improper under Miss. R. Civ. P. 59(a)(2) because the chancellor error by denying the mother's motion to reconsider his Al-

bright analysis. Over two years had passed since this custody hearing and the chancellor was directed to conduct a new Albright analysis to determine the child's best interest and to consider fully the present circumstances of the mother, the father, and the biological father when determining custody and visitation rights. Smullins v. Smullins, — So. 3d —, 2011 Miss. App. LEXIS 56 (Miss. Ct. App. Feb. 1, 2011), opinion withdrawn by, substituted opinion at 77 So. 3d 119, 2011 Miss. App. LEXIS 725 (Miss. Ct. App. 2011).

Rule 60. Relief from judgment or order.

JUDICIAL DECISIONS

Applicability.
Clerical mistake.
Correction of judgment.
Fraud.
Procedure.
Review.
Timeliness of motion.
Void judgments.
Illustrative cases.

Applicability.

In a personal injury action by guests, the trial court did not abuse its discretion in denying the guests' motions for relief from judgment and to set aside order because Miss. R. Civ. P. 60 was not a substitute for appeal and the relief sought was nothing more than an escape hatch after failing to timely pursue other available procedural remedies. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Clerical mistake.

Appellant property owner's assertion that the chancellor committed manifest error by incorrectly describing the parties' new boundary line was without citation to legal authority and therefore, the appellate court was under no obligation to consider the assignment of error. However, pursuant to Miss. R. Civ. P. 60(a), the appellate court granted leave to the chancery court to correct, if necessary, any clerical errors that might be found in the boundary-line description contained in the judgment. Conliff v. Hudson, 60 So. 3d 203 (Miss. Ct. App. 2011).

Correction of judgment.

Because a wife's motion to correct was filed more than ten days after the chanceyr court entered its amended order regarding motions to reconsider, it had to be treated as a Miss. R. Civ. P. 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

Because a wife's motion to correct was filed more than ten days after the chanceyr court entered its amended order regarding motions to reconsider, it had to be treated as a Miss. R. Civ. P. 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

As a trial court judge, prior to recusal, had the authority under Miss. R. Civ. P. 60(a) to clarify his judgment in parties' divorce proceeding, a successor judge who was appointed after trial had the authority under Miss. R. Civ. P. 63(b) to perform the same duties. Jones v. Mayo, 53 So. 3d 832 (Miss. Ct. App. 2011).

Fraud.

Mother did not show by clear and convincing evidence that a father committed a fraud upon the court for Miss. R. Civ. P. 60(b)(1) purposes as the father did not testify at the rehearing, and the motivation for his move with the children one month after being awarded custody was unclear; the chancery court did not identify what it relied upon in its award of custody to the father, and it could not be discerned whether the circumstances of the move would have made a difference in the chancellor's decision. Parra v. Parra, 65 So. 3d 872 (Miss. Ct. App. 2011).

Procedure.

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from

judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Review.

Court of appeals refused to consider appellants' argument that a chancery court erred in denying their motion under Miss. R. Civ. P. 60 to set aside an order granting appellee summary judgment in appellants' action to set aside a foreclosure because appellants failed to cite to any authority in support of their argument that the chancery court erred by not setting aside a foreclosure due to newly discovered evidence. Davis v. Countrywide Home Loans, Inc., 72 So. 3d 1163 (Miss. Ct. App. 2011).

Timeliness of motion.

Chancery court lacked jurisdiction to grant a wife's motion to reconsider following a husband's notice of appeal because the wife filed her Miss. R. Civ. P. 60 motion nearly two months after the chancery court entered its order regarding the parties' motions to reconsider; therefore, Miss. R. App. P. 4(d) did not apply, and the chancery court did not retain jurisdiction to grant the Rule 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

Chancery court lacked jurisdiction to grant a wife's motion to reconsider following a husband's notice of appeal because the wife filed her Miss. R. Civ. P. 60 motion nearly two months after the chancery court entered its order regarding the parties' motions to reconsider; therefore, Miss. R. App. P. 4(d) did not apply, and the chancery court did not retain jurisdiction to grant the Rule 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

Void judgments.

When a lender failed to comply with Miss. R. Civ. P. 4(c) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336 (Miss. Ct. App. 2011).

Illustrative cases.

In action to void a tax sale, a property owner failed to comply with a settlement agreement the owner entered into with a purchaser; thus, a circuit court did not err in finding that the purchaser owned the property and in refusing to broaden or amend its ruling in considering the owner's Miss. R. Civ. P. 60(b) motion after the owner filed his notice of appeal. Howard v. Gunnell, 63 So. 3d 589 (Miss. Ct. App. 2011).

Chancellor did not abuse discretion in granting guardians' motion under Miss. R. Civ. P. 60(b)(6) as to the settlement of a minor's medical negligence claims against a registered nurse, as the petition for settlement was incomplete and there was no witness testimony on the minor's injury or damages. Carpenter v. Berry, 58 So. 3d 1158 (Miss. 2011).

Under Miss. R. Civ. P. 60(a), a trial court judge properly clarified a prior divorce judgment between the parties to reflect that a husband could satisfy the wife's equitable distribution award with a portion of his retirement using a qualified domestic relations order rather than paying cash; the intent of the equitable distribution award was for the parties to receive an equal share of the marital assets, such that the failure to include a qualified domestic relations order in the divorce judgment was merely an oversight. Jones v. Mayo, 53 So. 3d 832 (Miss. Ct. App. 2011).

Victims of chemical exposure failed to rebut the presumption that their attorney had the apparent authority to settle their personal injury claims, such that a trial court's denial of their motion under Miss. R. Civ. P. 60(b) for relief from an enforcement order of the settlement was not an abuse of discretion. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

CHAPTER X. COURTS AND CLERKS

Rule 81. Applicability of rules.

JUDICIAL DECISIONS

Summons.
Illustrative cases.

Summons.

Chancellor in a partition action should have required additional service of Miss. R. Civ. P. 81 summonses on all of the remaining co-owners of the subject property before holding a subsequent hearing because the initial hearing was continued or recessed without addressing the merits of the case and without entry of an order or a continuance. Brown v. Tate, 95 So. 3d 745 (Miss. Ct. App. 2012).

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Although counsel for both parties appeared before the chancellor when sanctions were imposed against a spouse for delay in leaving the marital home that was being sold, Miss. R. Civ. P. 81 required that a summons be personally served on the spouse before the contempt proceeding. A new contempt hearing after proper notice was ordered. Hanshaw v. Hanshaw, 55 So. 3d 143 (Miss. 2011).

Illustrative cases.

Constructive criminal contempt judgments against a process server, a notary, and the owner of a process service company (accuseds) were vacated as a chancellor violated the accuseds' due process rights under Miss. Const. art. III, § 26 since he failed to recuse himself after initiating the proceedings, and failed to issue summonses notifying the accuseds of the criminal nature of the charges against them under Miss. R. Civ. P. 81(d). In re McDonald, 98 So. 3d 1040 (Miss. Oct. 4, 2012).

Index to Rules of Civil Procedure

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

JUDICIAL DECISIONS

Photographs.
Writings.
Illustrative cases.

Photographs.

Trial judge's decision that a photograph's content was not too remote in time to be relevant was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594 (Miss. Ct. App. 2011).

Writings.

Admission of defendant's letters to a child abuse victim's mother a year prior to an incident were admissible evidence under Miss. R. Evid. 401 as they contained defendant's views on disciplining children. Baker v. State, 70 So. 3d 235 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 445 (Miss. 2011).

Illustrative cases.

Ammunition was properly admitted in defendant's aggravated assault trial because it was recovered shortly defendant's arrest in the same area where defendant was found hiding with a rifle and the rifle was the only weapon recovered in the area. Ferguson v. State, 95 So. 3d 1279 (Miss. Ct. App. 2012).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

RESEARCH REFERENCES

ALR. Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

JUDICIAL DECISIONS

Cumulative evidence.
Drug offenses.
Flight.
Other crimes.
Photographs.
Prior conviction.

Illustrative cases.

Cumulative evidence.

In a suit brought against a water park for injuries a patron sustained while on a water slide, while testimony by the patron's mother regarding the condition of the slides the day after the patron's accident was improperly excluded under Miss. R. Evid. 403 on the basis that it was unfairly prejudicial, the circuit court did not err in excluding the mother's testimony because, not only was it irrelevant, it was also cumulative and could have been excluded under Rule 403 on that basis. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

Drug offenses.

In a prosecution for the sale of drugs, evidence of defendant's prior drug convictions was improperly admitted, as the evidence was prejudicial and the jury heard continual references to defendant's prior convictions before defendant had any opportunity to present a defense. Hargett v. State, 62 So. 3d 950 (Miss. 2011).

Flight.

Given the record in the case, a circuit court did not abuse its discretion by admitting testimony regarding defendant's out-of-state flight because defendant jumped bond in Mississippi and fled to Florida; when authorities in Mississippi learned of defendant's location through, they contacted authorities in Florida only to learn that defendant had posted a cash bond and been released, and defendant was subsequently arrested again in Texas. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011).

Defendant's objection to the admission of evidence that he had jumped bond after being arrested on the ground that it was irrelevant and prejudicial was insufficient to preserve the issue for appeal because defendant's counsel never articulated in his objection that any probative value of the flight evidence was substantially outweighed by its prejudicial effect; while defendant's attorney objected to an officer's testimony as irrelevant, the attorney failed to make any objection regarding Miss. R. Evid. 403 at trial. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011).

Other crimes.

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Photographs.

It was within the trial judge's discretion to determine that a photograph of handcuffs in defendant's car was relevant, and the trial judge did not abuse his discretion when he decided that the danger of unfair prejudice did not substantially outweigh that probative value because the photograph had probative value; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594 (Miss. Ct. App. 2011).

Prior conviction.

Circuit court did not err in admitting defendant's prior drug-sale convictions into evidence because the prior drug convictions were properly admitted under Miss. R. Evid. 404(b) to show defendant's intent to sell; the circuit court conducted a proper Miss. R. Evid. 403 balancing test. Campbell v. State, — So. 3d —, 2012 Miss. App. LEXIS 608 (Miss. Ct. App. Oct. 2, 2012).

Illustrative cases.

Circuit court's admission of a farmer's practices prior to his first termination by a corporation did not violate Miss. R. Evid. 404 because evidence of the farmer's poor performance was relevant to the corporation's defense of the farmer's claim that it had entered into the contract with him for the sole purpose of convincing him to refinance his defaulted loan with another lender and wipe the loan from its books; the farmer failed to show that evidence of his prior performance had to be excluded under Miss. R. Evid. 403. Harrison v. Walker, 91 So. 3d 41 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

RESEARCH REFERENCES

ALR. Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

JUDICIAL DECISIONS

Drug offenses.
Failure to consider Miss. R. Evid. 403.
Limiting instruction.
Other crimes.
Prior drug sales.
Recorded statement.
Illustrative cases.

Drug offenses.

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Limiting instruction.

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the witness's brief comment about defendant's imprisonment was not prompted by the State and was immediately addressed by the trial court's limiting instruction that defendant's time in prison had nothing to do with the case; the curative instruction was sufficient to remedy any improper reference to defendant's criminal past and prevent any undue prejudice. Moore v. State, — So. 3d —, 2012 Miss. App. LEXIS 506 (Miss. Ct. App. Aug. 14, 2012).

Other crimes.

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the State did not elicit the witness's statements about defendant being in the penitentiary to prove defendant's bad character; in briefly mentioning the penitentiary, the witness did not say what crime defendant had committed. Moore v. State, — So. 3d —, 2012 Miss. App. LEXIS 506 (Miss. Ct. App. Aug. 14, 2012).

Inmate was not entitled to habeas relief on the ground that counsel was ineffective for failing to object to the use of evidence of other crimes the inmate committed because under Miss. R. Evid. 404(b), although evidence of other crimes or misdeeds was not admissible to prove the character of person in order to prove that the person acted in conformity with that character; such proof may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b). The State could not paint a rational picture of the events leading up to the shooting or show motive, the stolen drugs, or preparation, theft of the gun, without mentioning those acts, and defendant could not have put on proof of self-defense without mentioning those facts; therefore, counsel had no basis for raising an objection to use of that evidence, and as such his counsel was effective. Chandler v. Marshall County Corr. Ctr., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 96070 (N.D. Miss. Sept. 14, 2010).

Prior drug sales.

In defendant's trial on a charge of possession of cocaine with intent to distrib-

ute, a circuit court properly found evidence of defendant's two prior convictions involving the transfer of a controlled substance was admissible, pursuant to Miss. R. Evid. 404, because the prior convictions were evidence of intent and the circuit court instructed the jury on the use of such evidence. Hosey v. State, 77 So. 3d 507 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Recorded statement.

Trial court did not abuse its discretion in admitting a recorded statement, even though defendant's motion in limine had been granted under Miss. R. Evid. 404(b), as defense counsel urged the recording's admission without first seeking to have the statement redacted, where she preferred that the recorded statement be played for the jury and characterized the statement as the best evidence of defendant's conversation with a police sergeant. Melton v. State, — So. 3d —, 2012 Miss. App. LEXIS 618 (Miss. Ct. App. Oct. 9, 2012).

Illustrative cases.

Circuit court did not err in admitting into evidence a farmer's practices prior to his first termination because the farmer presented evidence regarding his relationship with a corporation prior to his first termination; because the farmer introduced evidence of his business relations with the corporation that occurred before his first termination, he could not complain that the corporation introduced its own evidence from the same time period. Harrison v. Walker, 91 So. 3d 41 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Circuit court's admission of a farmer's practices prior to his first termination by a corporation did not violate Miss. R. Evid. 404 because evidence of the farmer's poor performance was relevant to the corporation's defense of the farmer's claim that it had entered into the contract with him for the sole purpose of convincing him to refinance his defaulted loan with another lender and wipe the loan from its books; the farmer failed to show that evidence of his prior performance had to be excluded under Miss. R. Evid. 403. Harrison v. Walker, 91 So. 3d 41 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Trial court did not prevent defendant from presenting his theory of defendant — that during defendant's suicide attempt, the victim tried to wrestle defendant's gun away from him, leading to the accidental discharge that killed the victim — as defendant's proffered testimony relating to his prior suicide attempts was too vague and unspecific to support admission under Miss. R. Evid. 404(b). Specifically, defendant failed to provide evidence as to identifable time periods during which his alleged suicide attempts took place. Adams v. State, 62 So. 3d 432 (Miss. Ct. App. 2011).

ARTICLE VI. WITNESSES

Rule 607. Who may impeach.

JUDICIAL DECISIONS

Illustrative cases.

It was error under Miss. R. Evid. 607 to exclude portions of a murder witness's videotaped statement in which she told police that the victim was armed, even though the defense was attempting to impeach the in-court testimony of its own witness. However, the error was harmless because the jury was fully informed that the in-court testimony was inconsistent with prior out-of-court statements to the police and to defendant's counsel. Young v. State, 99 So. 3d 159 (Miss. Oct. 4, 2012).

Rule 616. Bias of witness.

JUDICIAL DECISIONS

Illustrative cases.

Evidence that plaintiffs but not defendants pressed theft charges against defendants' employee, who testified for defendants, was properly excluded; it was not probative of his bias because the alleged thefts and the criminal charges arose and were resolved after plaintiffs had deposed him. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., — So. 3d —, 2012 Miss. LEXIS 488 (Miss. Oct. 4, 2012).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses.

JUDICIAL DECISIONS

Opinions.
Police testimony.
Illustrative cases.

Opinions.

Although defendant argued a police officer provided inadmissible lay opinion testimony, pursuant to Miss. R. Evid. 701, the only matter the officer testified to was that, in his opinion, it was necessary to send two detectives to determine whether defendant was selling drugs; the officer did not testify that, in his opinion, defendant was selling narcotics. Hosey v. State, 77 So. 3d 507 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Police testimony.

During defendant's trial for possession of a firearm by a convicted felon, the court erred in allowing an officer to testify as a lay witness about external factors that affected whether or not fingerprints could be recovered off of a gun because the officer's testimony was based on the officer's experience as an officer and the training the officer had received in fingerprint analysis. Conner v. State, 45 So. 3d 300 (Miss. Ct. App. Oct. 5, 2010).

Illustrative cases.

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Rule 702. Testimony by experts.

JUDICIAL DECISIONS

Computer information.
Forensic pathologist.
Medical expert.
Qualification of expert.
Illustrative cases.

Computer information.

Expert's use of a computer-aided design program to create a simulation of the expert's alternative design of a beam connecting the roof of a car to its body was sufficiently reliable for purposes of Miss. R. Evid. 702; the expert was not required to physically build a model of the alternative design in order to demonstrate its efficacy. Hyundai Motor Am. v. Applewhite, 53 So. 3d 749 (Miss. 2011).

Forensic pathologist.

Defendant's manslaughter conviction was proper because the trial court did not err in admitting a forensic pathologist's testimony since he met the standard for admission of expert testimony. The expert testified that he obtained a medical degree, that he had pathology training, and that he had more than 30-years experience within the field of forensic pathology; there was no suggestion in the record that the testimony was based on unreliable principles and methods or that the expert misapplied the principles and methods to the facts of the case. Showers v. State, 70 So. 3d 241 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 444 (Miss. 2011).

Medical expert.

While a surgeon was properly qualified as an expert in surgery under Miss. R. Evid. 702, a doctor was entitled to a new trial in a medical malpractice matter as a decedent's wife failed to supplement her discovery responses regarding the substance of the expert's testimony as required by Miss. R. Civ. P. 26 (f)(1)(B) and 26(f)(2)(A) to disclose the substance of the expert's evolving-second-ulcer theory and to provide meaningful information about the decedent's hemoglobin and hematocrit levels as to enable the doctor's counsel to meet the expert's testimony at trial; the doctor's unexercised right to depose the expert did not excuse the wife's unfulfilled duty to supplement and amend her expert's opinion. Cleveland v. Hamil, — So. 3d —, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012).

Wife's expert was not qualified as an expert in gastroenterology under Miss. R. Evid. 702 where the expert: (1) was not a gastroenterologist; (2) had not really had any gastroenterology training; (3) had not participated in any continuing medical education about gastroenterology; (4) had never performed any gastroenterologist-specific medical procedures; and (5) had never been consulted as a gastroenterologist. The expert's experience as a surgeon with upper GI bleeds did not show he was familiar with gastroenterology and the standard of care required of a gastroenterologist treating an upper GI bleed. Cleveland v. Hamil, — So. 3d —, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012).

Summary judgment in favor of a doctor and a clinic was appropriate in a medical malpractice and wrongful death action because the obstetrician-gynecologist whom the parents had offered as an expert was unable to provide reliable testimony regarding the cause of their baby's death and, thus, the testimony was inadmissible under Miss. R. Evid. 702. The expert was not a pathologist and did not present any scientific evidence that supported his opinion as to cause of death. In fact, the parents offered as an additional expert witness, a pathologist who gave an opinion different from the obstetrician-gynecologist's conclusion. Further, the expert did not study the placental tissues of the baby under a microscope. Finally, the autopsy report did not establish placental insufficiency as the cause of death. Worthy v. McNair, 37 So. 3d 609 (Miss. 2010).

In a personal injury action, a trial court's granting of a motion to strike the expert testimony of a doctor was arbitrary and clearly erroneous, and constituted an abuse of discretion, where the opinion of the doctor, a qualified obstetrician and gynecologist, was based on an interpretation of the medical records in light of the doctor's experience, training, and expertise. The doctor's opinion did not amount to mere speculation. It constituted a scientifically grounded theory of causation, not junk science. Maliyah Ashunti Hubbard v. McDonald's Corp., 41 So. 3d 670 (Miss. 2010).

Qualification of expert.

Engineer may be qualified as an expert witness under Miss. R. Evid. 702 even if he or she is not licensed in Mississippi as an engineer pursuant to Miss. Code Ann. §§ 73-13-1 through 73-13-45. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., — So. 3d —, 2012 Miss. LEXIS 488 (Miss. Oct. 4, 2012).

Engineer may be qualified as an expert witness under Miss. R. Evid. 702 even if he or she is not licensed in Mississippi as an engineer pursuant to Miss. Code Ann. §§ 73-13-1 through 73-13-45. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., — So. 3d —, 2012 Miss. LEXIS 488 (Miss. Oct. 4, 2012).

Circuit court did not err in granting a hospital's motion for summary judgment in a negligence action brought by a contractor's employee, who fell when exiting a hospital elevator, because the physician proffered by the employee as an expert admitted that he had no basis for his conclusion that the employee's back complaints appeared to be result of a fall that occurred six years prior to his treatment, other than the history from the employee herself, and as such the physician lacked the requisite factual knowledge to testify as an expert witness. Buckley v. Singing River Hosp., 99 So. 3d 248 (Miss. Ct. App. Oct. 2, 2012).

In a slip and fall case, appellee's treating physician, an internal medicine and pulmonary medicine specialist, was qualified to opine regarding diagnosing his hip problem and referring him to an orthopedic surgeon, but was not qualified to give a causation opinion as to the need for a hip replacement because it was outside his discipline. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986 (Miss. 2012).

Illustrative cases.

In a slip and fall case, plaintiff's treating physician was improperly allowed to give a causation opinion as to the need for plaintiff's hip replacement as there was no evidence he consulted any literature, applied a particular theory, performed any procedures, or relied on any principles, methodologies, or scientific methods in concluding that the need for the hip replacement was caused by the fall; therefore, his opinion was not reliable under Daubert. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986 (Miss. 2012).

In a sexual battery case, an expert's testimony was admissible under Miss. R. Evid. 702 because he had a degree in psychology and a Ph.D. in clinical psychology, he had been a psychologist for forty years, and he testified that the victim demonstrated behavior consistent with a victim of sexual abuse, not that she was a victim of sexual abuse. Collins v. State, 70 So. 3d 1144 (Miss. Ct. App. 2011).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Exclusion of expert testimony in a negligence action was improper, in part, because the jury should have been able to weigh the credibility of the expert's distance and timing estimates, which largely were based on facts in the record and would have aided the jury. Denham v. Holmes, 60 So. 3d 773 (Miss. 2011).

Exclusion of expert testimony in a negligence action was proper, in part, because the expert failed to connect the dots between the skid marks and the existing physical evidence and thus, his conclusion regarding causation was unreliable. Moreover, the expert's conclusion regarding whether the driver had created an immediate hazard was not based on specialized, technical, or scientific knowledge. Denham v. Holmes, 60 So. 3d 773 (Miss. 2011).

RESEARCH REFERENCES

ALR. Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. 18 A.L.R. 6th 325.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. • 18 A.L.R. 6th 613.

Admissibility of Expert Testimony by Nurses. 24 A.L.R.6th 549.

Necessity and Admissibility of Expert Testimony to Establish Malpractice or Breach of Professional Standard of Care by Architect. 47 A.L.R.6th 303.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

JUDICIAL DECISIONS

Admission by party opponent.
Statement.
Rebuttal of implication raised by opponent.

Admission by party opponent.

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as an admission by a party opponent under Miss. R. Evid. 801(d)(2) as the mother could not identify the employee she spoke to and as the employee worked at a concession stand; therefore, it did not appear that the provisions of Rule 801(d)(2) applied since the mother did not prove that the employee was authorized to speak on the subject of where lifeguards should be or should not be on duty. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

Statement.

Trial court did not err in admitting a witness's testimony that the victim had told the witness that defendant had raped her because the victim's prior statements served a purpose other than to prove the truth of the matter asserted, i.e., that defendant had raped her; the statements rehabilitated the victim as a witness and were admissible for that purpose because they recounted that defendant had forced himself on the victim, and they were consistent with the victim's trial testimony and refuted defendant's assertions that the victim had instigated their encounter and had fabricated her story for trial. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012).

Rebuttal of implication raised by opponent.

Under Miss. R. Evid. 801(d)(1)(B), an officer's testimony as to what the widow told him was admissible and not hearsay because it served to rebut the implication raised by defendant that the widow's testimony was shaped by her unhappiness with the cost of the work or by her son's reaction to the incident. Cooper v. State, 68 So. 3d 741 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 404 (Miss. 2011).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

JUDICIAL DECISIONS

Medical treatment.
Public records and reports.
Regularly conducted activity.
Tender years exception.

Illustrative cases.

Medical treatment.

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212 (Miss. Ct. App. 2011).

Testimony of a hospital social worker as to a victim's statements was properly admitted under Miss. R. Evid. 803(4), as the circumstances surrounding the statements indicated substantial trustworthiness; the statements were made after a violent crime victim had just been brought into the hospital and were made in the company of a nurse and a police officer. Cox v. State, 66 So. 3d 182 (Miss. Ct. App. 2010), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 350 (Miss. 2011).

Public records and reports.

In a capital murder trial, the introduction of the victim's death certificate into evidence was proper under Miss. R. Evid. 803(9) and the authenticity of the death certificate was established by Miss. R. Evid. 902(4). Any failure to redact the time of injury from the certificate was unimportant in relation to everything else the jury considered on the issue in question. Birkhead v. State, 57 So. 3d 1223 (Miss. 2011).

Regularly conducted activity.

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212 (Miss. Ct. App. 2011).

Defendant's convictions for two counts of capital murder and one count of robbery were appropriate because the contents of an actual trace run by the ATF were most likely admissible under Miss. R. Evid. 803(6). Therefore, any error in allowing a detective to testify regarding the result of the trace was harmless. Minter v. State, 64 So. 3d 518 (Miss. Ct. App. 2011), writ of certiorari denied by 63 So. 3d 1229, 2011 Miss. LEXIS 322 (Miss. 2011).

Tender years exception.

Trial court erred in allowing a forensic psychologist to testify about a child's statement that defendant had put his mouth on the child's penis, as the trial court made no finding as to the reliability of the hearsay statement and did not conduct a hearing outside the presence of the jury as required by Miss. R. Evid. 803(25). Rogers v. State, 95 So. 3d 623 (Miss. Aug. 16, 2012).

Illustrative cases.

In a rape case, admission under Miss. R. Evid. 803(3) of a witness's testimony that the victim told him she had been raped by defendant was error as the statement did not relate to the execution, revocation, identification, or terms of her will. But, the error was harmless since the properly admitted evidence was more than sufficient to convict. Ben v. State, 96 So. 3d 9 (Miss. Ct. App. 2011), affirmed by 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012).

Trial court did not err in allowing a child rape victim's hearsay statements to be admitted under Miss. R. Evid. 803(25) in defendant's statutory rape trial as the victim was eleven years old when she told her mother and aunt that defendant had been having sexual intercourse with her, the statements were spontaneous and consistently repeated, the victim's mental stated seemed to be one of a person who

would not fabricate, the victim seemed to be of the character that would be able to relate things reliably to those she to whom she was speaking, more than one person had heard the statements, her relationships to the witnesses showed reliability, the possibility of a faulty recollection was remote, and the people giving the statements seemed to be credible. Anderson v. State, 62 So. 3d 927 (Miss. 2011).

Rule 804. Hearsay exceptions; declarant unavailable.

JUDICIAL DECISIONS

Unavailability.

Trial court committed no error when it held that the State established a witness's unavailability under Miss. R. Evid. 804(a)(5) because the State made reasonable and diligent efforts to locate the witness; the State had its criminal investigator testify on his efforts to locate the witness. Thomas v. State, — So. 3d —, 2012 Miss. App. LEXIS 605 (Miss. Ct. App. Oct. 2, 2012).

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as a statement against interest under Miss. R. Evid. 804(b)(3) as there was no evidence that the employee was unavailable, in that there was no evidence that the mother tried to procure the attendance of the employee who made the statement. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR. Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 A.L.R.6th 1.

MISSISSIPPI RULES OF APPELLATE PROCEDURE

APPLICABILITY OF RULES

Rule 4. Appeal as of right — When taken.

JUDICIAL DECISIONS

Cross-appeals.
Post-trial motions in civil cases.
Post-trial motions in criminal cases.
Time for appeal.
Illustrative cases.

Cross-appeals.

Appellate court lacked jurisdiction over a father's cross-appeal, seeking to fully emancipate his son, because the father missed his time to file a cross-appeal, Miss. R. App. P. 4(c), and the chancellor failed to rule on the father's request that his time to file a cross-appeal be reopened, Rule 4(g). Finch v. Finch, — So. 3d —, 2012 Miss. App. LEXIS 610 (Miss. Ct. App. Oct. 2, 2012).

Post-trial motions in civil cases.

Chancery court lacked jurisdiction to grant a wife's motion to reconsider following a husband's notice of appeal because the wife filed her Miss. R. Civ. P. 60 motion nearly two months after the chancery court entered its order regarding the parties' motions to reconsider; therefore, Miss. R. App. P. 4(d) did not apply, and the chancery court did not retain jurisdiction to grant the Rule 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

Chancery court lacked jurisdiction to grant a wife's motion to reconsider following a husband's notice of appeal because the wife filed her Miss. R. Civ. P. 60 motion nearly two months after the chancery court entered its order regarding the parties' motions to reconsider; therefore, Miss. R. App. P. 4(d) did not apply, and the chancery court did not retain jurisdiction to grant the Rule 60 motion. Marter v. Marter, 95 So. 3d 733 (Miss. Ct. App. 2012).

Post-trial motions in criminal cases.

Court of appeals had jurisdiction of the issue of whether the trial court had the authority to amend defendant's sentence because pursuant to Miss. R. App. P. 4(a), defendant filed his notice of appeal within the thirty days of the denial of the motion for a reduction of sentence. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

Time for appeal.

Summary judgment for a neighbor in an owner's boundary dispute suit was affirmed because the owner did not appeal the summary judgment within 30 days as required by Miss. R. App. P. 4(a), and failed to timely file a Miss. R. Civ. P. 59 or Miss. R. Civ. P. 60 motion. Piernas v. Campiso, 95 So. 3d 723 (Miss. Ct. App. Aug. 7, 2012).

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

In a personal injury action by guests against a casino, an appeal of the denial of the guests' motion to reconsider was time-barred where, following the denial of their reconsideration motion, the guests filed a recusal motion instead of filing a notice of appeal. The time for appeal commenced under Miss. R. App. P. 4(d) when the

reconsideration motion was denied and the guests' failure to perfect a notice of appeal within 30 days subjected the appeal to dismissal. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Illustrative cases.

Because a county, claiming sovereign immunity, filed a notice of appeal of right pursuant to Miss. R. App. P. 4 instead of a petition for an interlocutory appeal under Miss. R. App. P. 5, and because the Supreme Court of Mississippi declined to adopt the federal "collateral order" doctrine, the county's appeal was unreviewable. Hinds County v. Perkins, 64 So. 3d 982 (Miss. June 30, 2011).

Whether a trial court erred in denying a defendant's motion to designate his motion for a reduction of sentence as a motion for post-conviction relief was not properly before the court of appeals because although defendant raised the issue in his brief, no notice of appeal was given on the issue. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

Rule 5. Interlocutory appeal by permission.

JUDICIAL DECISIONS

Illustrative cases.

Because a county, claiming sovereign immunity, filed a notice of appeal of right pursuant to Miss. R. App. P. 4 instead of a petition for an interlocutory appeal under Miss. R. App. P. 5, and because the Supreme Court of Mississippi declined to adopt the federal "collateral order" doctrine, the county's appeal was unreviewable. Hinds County v. Perkins, 64 So. 3d 982 (Miss. June 30, 2011).

Because a summary judgment was not certified as final under Miss. R. Civ. P. 54(b), and because a tenant neither sought nor was afforded permission under Miss. R. App. P. 5 to proceed with an interlocutory appeal, the appellate court lacked jurisdiction to hear the tenant's appeal. Anderson v. Britton & Koontz Bank, N.A., 55 So. 3d 1130 (Miss. Ct. App. 2011).

Rule 6. Counsel on appeal in criminal cases and proceedings *in Forma Pauperis* in criminal cases.

JUDICIAL DECISIONS

Right to self representation.

Defendant's motion to dismiss his appellate counsel was granted, as the trial judge informed him of his constitutional rights and the perils of self-representation, and he stated unequivocally that he desired to act as his own attorney. Grim v. State, 102 So. 3d 1073 (Miss. 2012).

CERTIFIED QUESTIONS FROM FEDERAL COURTS

Rule 20. Certified questions from federal courts.

JUDICIAL DECISIONS

Certification of questions relating to statutory noneconomic damages.

High court declined to answer a certified question regarding the constitutionality of Miss. Code Ann § 11-1-60(2), which generally limited noneconomic damages to $ 1 million, because it would require speculation and guesswork to determine what portion of the jury's $ 4 million general verdict represented noneconomic damages. Sears v. Learmonth, 95 So. 3d 633 (Miss. Aug. 23, 2012).

GENERAL PROVISIONS

Rule 38. Damages for frivolous appeal.

JUDICIAL DECISIONS

Illustrative cases.

Father's appeal of a chancellor's denial of a recusal motion in a custody proceeding was frivolous because the chancellor recused himself long before the appeal was filed, the father had notice of the recusal but nonetheless pursued the appeal, and he had been warned against filing meritless claims. Balius v. Gaines, 95 So. 3d 730 (Miss. Ct. App. 2012).

Father's appeal of a chancellor's denial of a recusal motion in a custody proceeding was frivolous because the chancellor recused himself long before the appeal was filed, the father had notice of the recusal but nonetheless pursued the appeal, and he had been warned against filing meritless claims. Balius v. Gaines, 95 So. 3d 730 (Miss. Ct. App. 2012).

Rule 3.07. Jury instructions.

JUDICIAL DECISIONS

Harmless error.

Defendant failed to show how he was prejudiced when the trial court instructed the jury on the lesser-included offense of possession when the prosecutor failed to file the request for such an instruction at least 24 hours prior to trial. Watkins v. State, 90 So. 3d 1283 (Miss. Aug. 16, 2012), modified by 2012 Miss. LEXIS 624 (Miss. Dec. 13, 2012).

Rule 4.04. Discovery deadlines and practice.

JUDICIAL DECISIONS

In general.
Special circumstances.
Failure to comply.

In general.

Trial court did not err in excluding a witness as a late-designated expert as the witness was not designated in a timely manner. While the trial was continued two months, resulting in the expert being identified 73 days prior to trial, the continuance was not intended to allow either party to designate additional experts. O'Keeffe v. Biloxi Casino Corp., 76 So. 3d 726 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 5 (Miss. 2012).

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192 (Miss. 2010).

Special circumstances.

Trial court did not err in allowing an employer to supplement the designation of its accident reconstruction expert three and a half weeks before the trial date as supplementation was required to address the widow's own late designation of her expert and a change in the widow's theory of the case occurring seventy-five days before trial. Martin v. B&B Concrete Co., 71 So. 3d 611 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 487 (Miss. 2011).

Failure to comply.

Trial court did not err in granting a hospital's motion for summary judgment and dismissing a contractor's employee's negligence action with prejudice because the employee committed a discovery violation by failing to designate a physician as an expert witness, supplement her interrogatories, and comply with the scheduling order; the employee fell when exiting a hospital elevator. Buckley v. Singing River Hosp., 99 So. 3d 248 (Miss. Ct. App. Oct. 2, 2012).

Where, despite a timely request for discovery from the defense, a motion to compel discovery, and a motion to continue the case, the State did not release requested

information on a confidential informant who was to be the key prosecution witness less than twenty-four hours before the start of the trial, defendant was entitled to a new trial. The trial court's reluctance to enforce the applicable rules of discovery, including Miss. Unif. Cir. & Cty. R. 9.04(A) and Miss. Unif. Cir. & Cty. R. 4.04(A), was reversible error. Patterson v. State, — So. 3d —, 2011 Miss. App. LEXIS 262 (Miss. Ct. App. May 10, 2011), opinion withdrawn by, substituted opinion at 93 So. 3d 43, 2011 Miss. App. LEXIS 752 (Miss. Ct. App. 2011).

Rule 8.04. Entry of guilty pleas, plea bargaining, withdrawal of guilty pleas.

JUDICIAL DECISIONS

Factual basis.
Knowing and intelligent.
Post-conviction proceedings.
Voluntariness.

Factual basis.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351 (Miss. Ct. App. 2011).

Post-conviction court did not err in finding there was a sufficient factual basis for appellant's guilty plea, as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(3), because the indictment, which was read in open court, set forth the charges against appellant and listed the elements of the charged offense; when questioned by the circuit court, appellant answered in the affirmative to reading the indictment, understanding the indictment, and discussing the charges with his attorney. Williams v. State, 64 So. 3d 1037 (Miss. Ct. App. 2011).

Knowing and intelligent.

Summary dismissal of a post-conviction motion under Miss. Code Ann. § 99-39-11(2) was proper as the inmate's due process rights were not violated and his guilty plea was knowing, intelligent, and voluntary where: (1) the indictment was not amended, and charged the inmate with possessing more than two grams but less than ten grams of cocaine with the intent to sell under Miss. Code Ann. § 41-29-139(a)(1); (2) the trial court thoroughly advised the inmate of his rights, the nature and elements of the charge against him, and the consequences of his guilty plea; (3) there was a factual basis for the plea under Miss. Unif. Cir. & Cty. R. 8.04(A)(3); (4) the trial court was satisfied that the inmate understood the trial court's explanations, and waived his rights as a criminal defendant; and (5) the trial court was also satisfied with the inmate's and defense counsel's responses as to the inmate's alleged mental illness. Hunt v. State, 99 So. 3d 269 (Miss. Ct. App. Oct. 16, 2012).

Although a prisoner argued he unwillingly pleaded guilty to manslaughter, the prisoner's motion for post-conviction relief was properly dismissed because according to the plea colloquy, the trial court thoroughly advised the prisoner of his rights, the nature and elements of the charges, as well as the consequences of the guilty plea; the colloquy also showed the prisoner expressly indicated to the trial court's satisfaction that he understood each of the trial court's advisements, and he wished to waive the rights ordinarily due a criminal defendant. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 95 So. 3d 654, 2012 Miss. LEXIS 283 (Miss. 2012).

Post-conviction proceedings.

Although a prisoner argued the trial court failed to conduct a mental evaluation and a competency hearing under Miss. Unif. Cir. & Cty. R. 9.06, a post-conviction court properly dismissed the prisoner's motion for post-conviction relief because the prisoner indicated in his plea petition that he did not have a mental impairment and responded to the trial judge during the plea colloquy that he had

never been treated for a mental disorder. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 95 So. 3d 654, 2012 Miss. LEXIS 283 (Miss. 2012).

Voluntariness.

Post-conviction relief was properly dismissed based on an allegation that a guilty plea was involuntary under Miss. Unif. Cir. & Cty. R. 8.04(A)(3) because the record showed that appellant was fully informed and aware of what was involved in a drug court program, and he accepted its terms and obligations. Moreover, appellant did not receive ineffective assistance of counsel when his defense attorney recommended a guilty plea. Thomas v. State, 65 So. 3d 341 (Miss. Ct. App. 2011).

Trial court did not err in denying an inmate's motion for post-conviction relief because his guilty plea was not the product of coercion from his counsel; even if the inmate accepted a plea bargain entirely because he was afraid of the death penalty, the plea would nonetheless be voluntary. Barnes v. State, 51 So. 3d 986 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 44 (Miss. 2011).

Rule 8.05. Pro se defendants.

JUDICIAL DECISIONS

Compliance with rule.
Right to self representation.

Compliance with rule.

Circuit court did not err in allowing defendant to represent himself because the circuit court abided by the law and the requirements of Miss. Unif. Cir. & Cty. R. 8.05; defendant made a knowing and intelligent waiver of his Sixth Amendment right to assistance of counsel, defendant knew that he had a right to counsel because counsel had been appointed to represent him, and defendant knew that his court-appointed counsel was representing him both before and after he elected to manage his own defense since he expressly agreed to counsel's continued assistance. Bradley v. State, 58 So. 3d 1166 (Miss. 2011).

Right to self representation.

Defendant's motion to dismiss his appellate counsel was granted, as the trial judge informed him of his constitutional rights and the perils of self-representation, and he stated unequivocally that he desired to act as his own attorney. Grim v. State, 102 So. 3d 1073 (Miss. 2012).

Rule 9.04. Discovery.

JUDICIAL DECISIONS

Informants.
Testimony improperly excluded.
Sanctions.
Unfair surprise or undue prejudice.
Witnesses.

Informants.

There was no abuse of discretion in a trial court's implicit decision withholding discovery of an informant's name and address under Miss. Unif. Cir. & Cty. R. 9.04(B) where there was a concern for the witness's safety, and the trial court did not err in denying defendant's motion for a continuance following revelation of the witness's name because the trial court allowed defense counsel to question the witness before testimony began the next day and it was unlikely that a continuance would have resulted in a different verdict. Harris v. State, 37 So. 3d 1237 (Miss. Ct. App. 2010).

Testimony improperly excluded.

Trial court abused its discretion in excluding the testimony of a witness because his story that a victim possessed a gun was not discovered until after the trial began, and there was no evidence that defendant's discovery violation was willful. As the testimony corroborated defendant's testimony that he acted in self-defense, the error was not harmless. Williams v. State, 54 So. 3d 212 (Miss. 2011).

Sanctions.

Under Miss. Unif. Cir. & Cty. R. 9.04(I)(2) the trial court was not obligated to exclude a witness's written statement, grant a continuance, or grant a mistrial because after defendant's objection, the trial court properly granted the defense an opportunity to review the statement, and the defense did not seek a continuance or a mistrial; there was no evidence of prosecutorial misconduct in withholding the statement, and no evidence that the State was concealing the fact that it would call the witness. Thomas v. State, — So. 3d —, 2012 Miss. App. LEXIS 605 (Miss. Ct. App. Oct. 2, 2012).

Unfair surprise or undue prejudice.

Where, despite a timely request for discovery from the defense, a motion to compel discovery, and a motion to continue the case, the State did not release requested information on a confidential informant who was to be the key prosecution witness less than twenty-four hours before the start of the trial, defendant was entitled to a new trial. The trial court's reluctance to enforce the applicable rules of discovery, including Miss. Unif. Cir. & Cty. R. 9.04(A) and Miss. Unif. Cir. & Cty. R. 4.04(A), was reversible error. Patterson v. State, — So. 3d —, 2011 Miss. App. LEXIS 262 (Miss. Ct. App. May 10, 2011), opinion withdrawn by, substituted opinion at 93 So. 3d 43, 2011 Miss. App. LEXIS 752 (Miss. Ct. App. 2011).

Witnesses.

Trial court violated Miss. Unif. Cir. & Cty. R. 9.04(I) because defendant did not waive the issue of the State's discovery violation since an interview with an witness did not occur, and thus, defendant never had the burden to request a continuance; although the trial court erred by failing to follow Rule 9.04(I)(1)-(3), the error was harmless, and defendant's case was not unfairly prejudiced because defendant's alleged remark to the witness showed that he was sexually attracted to the victim and did not support that either forcible or consensual sexual intercourse occurred two days later. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012).

Defendant's motion for a continuance was properly denied as the State did not violate the discovery requirements of Miss. Unif. Cir. & Cty. R. 9.04 when defendant's co-defendant changed his plea to guilty and agreed to testify for the State on the second day of trial. Defendant was not ambushed by this, and he had ample opportunity to confront the co-defendant's testimony. Sanders v. State, 38 So. 3d 639 (Miss. Ct. App. 2010).

Rule 9.06. Competence to stand trial.

JUDICIAL DECISIONS

Abandoned motion.
Grounds for mental examination.

Abandoned motion.

Because the motion for appointment of a psychiatrist to conduct a psychiatric evaluation was never pursued to a decision, the matter was procedurally barred. Trammell v. State, 62 So. 3d 424 (Miss. Ct. App. 2011).

Grounds for mental examination.

Inmate's guilty plea to murder was valid as: (1) the inmate offered no evidence questioning his competency; (2) the key phrase in Miss. Unif. Cir. & Cty. R. 9.06 in determining whether a competency hearing was required was reasonable ground to believe that the defendant was incompetent; and (3) the trial court took great measures to ensure that the inmate understood his actions in pleading guilty and also the consequences of doing so. Higginbotham v. State, — So. 3d —, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. Sept. 25, 2012).

There was no abuse in the trial court's determination that defendant, who suffered from mental deficiencies, was incompetent to stand trial where the trial court believed that defendant was exaggerating his mental deficiencies during the plea colloquy and determined from defendant's demeanor and conduct during several court appearances and based on a tape-recorded confession that no ground existed to order a mental evaluation of de-

fendant to determine his competency to stand trial. Harden v. State, 59 So. 3d 594 (Miss. 2011).

UNIFORM CHANCERY COURT RULES

Adopted Effective February 1, 1989

8.00 RULES CONCERNING DIVORCE

Rule 8.05. Financial statement required.

JUDICIAL DECISIONS

Adjusted gross income.
Failure to disclose.
Judicial discretion proper.

Adjusted gross income.

In divorce proceedings, a husband did not commit fraud upon the chancery court by listing his monthly income as $ 15,000 on the Miss. Unif. Ch. Ct. R. 8.05 statement and shortly thereafter listing his income as $ 35,000 on a loan application because the chancellor addressed the discrepancy and found the amount of the loan application was an average of the husband's last two federal tax returns and did not consider the bankruptcy of a client of the husband's law firm and its financial impact on the firm; the chancellor found the husband's monthly gross income was $ 19,000. Dogan v. Dogan, 98 So. 3d 1115 (Miss. Ct. App. Oct. 9, 2012).

Failure to disclose.

Chancery court did not abuse its discretion in finding a wife committed a fraud upon the court by filing a substantially false Miss. Unif. Ch. Ct. R. 8.05 financial statement because the wife was aware of additional debts and bank accounts and failed to disclose them to the chancery court during its attempt to make an equitable divorce decree; therefore, the six-month time limitation of Miss. R. Civ. P. 60(b) did not apply, and the chancery court was within its discretion in vacating the original divorce judgment and altering the terms of that judgment. Finch v. Finch, — So. 3d —, 2012 Miss. App. LEXIS 610 (Miss. Ct. App. Oct. 2, 2012).

Judicial discretion proper.

While a chancellor erred in including rentals in a husband's income, the error was harmless as the chancellor discussed and made specific findings for child support under Miss. Code Ann. §§ 43-19-101, 43-19-103 and properly relied on the parties' Miss. Unif. Ch. Ct. R. 8.05 disclosure forms and other documentary evidence. Collins v. Collins, — So. 3d —, 2012 Miss. App. LEXIS 521 (Miss. Ct. App. Aug. 21, 2012).

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.7. Conflict of interest: general rule.

JUDICIAL DECISIONS

Applicability.
Ineffective assistance of counsel.

Applicability.

Defense counsel's representation of defendant did not violate Miss. R. Prof. Conduct 1.9 as counsel did not have an actual conflict where he formerly prosecuted defendant on a different charge wherein counsel signed the indictment, took defendant's plea, and prepared an order reflecting the plea, and the case was resolved under a new prosecutor as counsel was not so involved in prior matter that the subsequent representation of defendant could be regarded as a changing of sides; Miss. R. Prof. Conduct 1.7 did not apply as counsel did not represent the two clients simultaneously. Gregory v. State, 96 So. 3d 54 (Miss. Ct. App. 2012).

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Ineffective assistance of counsel.

Post-conviction relief petitioner was denied his U.S. Const. amend. VI right to counsel as trial counsel's representation of petitioner at the same time he represented a prosecution witness against petitioner was a per se actual conflict of interest that required an automatic reversal when there was no evidence that petitioner waived the conflict. Kiker v. State, 55 So. 3d 1060 (Miss. 2011).

Rule 1.9. Conflict of interest: former client.

JUDICIAL DECISIONS

Violation of Rule 1.9 not found.

Defense counsel's representation of defendant did not violate Miss. R. Prof. Conduct 1.9 as counsel did not have an actual conflict where he formerly prosecuted defendant on a different charge wherein counsel signed the indictment, took defendant's plea, and prepared an order reflecting the plea, and the case was resolved under a new prosecutor as counsel was not so involved in prior matter that the subsequent representation of defendant could be regarded as a changing of sides; Miss. R. Prof. Conduct 1.7 did not apply as counsel did not represent the two clients simultaneously. Gregory v. State, 96 So. 3d 54 (Miss. Ct. App. 2012).

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RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR

PART ONE. RULES OF DISCIPLINE

Rule 6. Suspensions and disbarments based on other proceedings.

JUDICIAL DECISIONS

Federal offenses.
Unethical financial conduct.

Federal offenses.

Given that an attorney's conviction of a felony in a federal district court was affirmed on appeal and she had exhausted the appellate process, Miss. R. Disc. St. Bar 6 required the Supreme Court of Mississippi to disbar the attorney from the practice of law in Mississippi. Miss. Bar v. Castle, 38 So. 3d 632 (Miss. 2010).

Unethical financial conduct.

Attorney's disbarment from the practice of law was appropriate under Miss. R. Disc. St. Bar 6(c) because his fraud, perjury, embezzlement, and abuse concerning a minor client's guardianship rendered him grossly unfit to practice law. Consequently, the Mississippi Bar met its burden to show that the attorney should be disbarred immediately. Miss. Bar v. Brown, — So. 3d —, 2012 Miss. LEXIS 474 (Miss. Oct. 4, 2012).

Rule 12. Reinstatement.

JUDICIAL DECISIONS

Reinstatement denied.
Reinstatement granted.

Reinstatement denied.

Attorney was not entitled to reinstatement because the attorney's petition failed to include the cause for her suspension in Mississippi or any information on the persons or entities who suffered pecuniary loss due to her conduct and said nothing about her moral character. Caldwell v. Miss. Bar, — So. 3d —, 2012 Miss. LEXIS 489 (Miss. Oct. 4, 2012).

Reinstatement granted.

Attorney's petition under Miss. R. Disc. St. Bar 12 for reinstatement to practice law in Mississippi was granted because the attorney had shown sufficiently that he was rehabilitated and had the requisite moral character to practice law in the State, the attorney accepted responsibility and expressed remorse for his actions throughout his petitions and deposition, and the attorney submitted that he had learned a valuable lesson over the past six years; letters of support, while laudable and relevant, were not necessarily dispositive of moral character and were not required by Miss. R. Disc. St. Bar 12, and the attorney attached to his petition a document from the National Conference of Bar Examiners, showing that he had scored a 90 on the Multistate Professional Responsibility Examination, well above the required score of 80 under Miss. R. Disc. St. Bar 12.5. Azki Shah v. Miss. Bar, 83 So. 3d 1274 (Miss. 2011).

Conditional grant of the attorney's petition for reinstatement to the practice of law contingent upon the attorney's taking and passing the Mississippi Bar Examination was appropriate because the attorney had proven by clear and convincing evidence that he had rehabilitated himself and was worthy of reinstatement to the practice of law. Daly v. Miss. Bar, 83 So. 3d 1262 (Miss. 2011).

Rule 13. Discipline in another jurisdiction.

JUDICIAL DECISIONS

Appropriate sanctions.

In a reciprocal disciplinary action, the attorney was suspended for six months, followed by 18 months of probation, publicly reprimanded, and assessed costs and expenses incurred by Mississippi Bar after the attorney failed to property supervise a nonlawyer assistant, neglected cases, engaged in misrepresentation, and failed to timely respond to an ethics complaint. Caldwell v. Miss. Bar, — So. 3d —, 2012 Miss. LEXIS 489 (Miss. Oct. 4, 2012).

RESEARCH REFERENCES

ALR. Reciprocal Discipline of Attorneys — Commingling or Other Mishandling of Client Funds. 45 A.L.R.6th 175.

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

JUDICIAL DECISIONS

Disqualification.
Exceeding scope of authority.
Improper communications.

Disqualification.

Trial judge abused his discretion in declining to recuse himself in a prosecution for aggravated assault and forcible rape of child, since he had served as county prosecuting attorney in an earlier youth-court shelter hearing regarding the child's custody as a result of the events giving rise to the criminal charges, and 1) the threshold issue in that hearing was whether the complainant was an "abused child" under Miss. Code Ann. § 43-21-105(m), which went to the heart of the issue of defendant's guilt; 2) the judge might have personal knowledge of disputed evidentiary facts concerning the criminal case due to his participation in the youth-court shelter hearing. Miller v. State, 94 So. 3d 1120 (Miss. 2012).

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Exceeding scope of authority.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him. Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss.

Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Improper communications.

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.